

ESTATE OF JAMES PHILIP WITMER

IBLA 83-838

Decided December 7, 1983

Appeal from decision by Montana State Office, Bureau of Land Management, rejecting simultaneous oil and gas lease application M 57851.

Reversed and remanded.

1. Oil and Gas Leases: Applications: Drawings--Oil and Gas Leases: Rentals

Where an oil and gas lease applicant with first priority dies after application, but prior to lease issuance, the administratrix of his estate is entitled to the lease when she files a sufficient offer to lease.

APPEARANCES: Paul B. Witmer, Jr., Esq., Santa Ana, California, for appellant.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

On April 25, 1983, a notice was sent by the Montana State Office, Bureau of Land Management (BLM), to James Philip Witmer (decedent), stating that he was the successful applicant for parcel MT 153 drawn with first priority in the January 1983 Montana simultaneous oil and gas lease drawing. The notice was sent by certified mail. A return receipt showing the notice was accepted by Renate Witmer on May 3, 1983, appears in the record on appeal. The notice from BLM states the first year's rental payment was due in the Montana office not later than 30 days following receipt of the notice. Payment of the first annual rental was not made on or before June 3, 1983, as required by the notice. On June 20, 1983, the application for parcel MT 153 made by decedent was rejected for nonpayment of rent.

On August 19, 1983, the lease rental payment for parcel MT 153 in the correct amount was tendered with executed copies of the Departmental lease form accompanied by an explanation that the tender was made on behalf of the estate of James Philip Witmer, who had died on March 21, 1983. According to the explanatory statement by appellant's attorney, Renate Witmer had been appointed administratrix of the estate on May 12, 1983.

In the statement of reasons filed in support of appeal, appellant reasons that under the circumstances of this case, where decedent had died following the drawing but before he received notification of his success, the notice was defective. According to appellant, dicta appearing in Overthrust

Oil and Gas Corp., 52 IBLA 119 (1981), concerning conditions for reinstatement of an existing lease upon a showing of justifiable excuse for late tender of payment should be applied here. Appellant also argues that the circumstances of the receipt of the BLM notice of rental due, where the notice was received prior to appointment of Renate Witmer as administratrix, should be sufficient to justify acceptance of the late offer of payment. Appellant's arguments do not consider the effect of the provisions of Departmental regulation 43 CFR 3112.4-1(a).

[1] The regulation material to this appeal, 43 CFR 3112.4-1(a), provides:

The lease agreement, consisting of lease form approved by the Director, Bureau of Land Management, and stipulations included on the posted list or later determined to be necessary, shall be forwarded to the first qualified applicant for signing, together with a request for payment of the first year's rental. Only the personal handwritten signature of the prospective lessee, or his/her attorney-in-fact as described in paragraph (b) of this section, in ink shall be accepted. The first year's rental shall be paid only by the applicant, or his/her attorney-in-fact as described in paragraph (b) of this section. The executed lease agreement and the applicant's rental payment shall be filed in the proper Bureau of Land Management office within 30 days from the date of receipt of notice. Timely receipt of the properly signed lease and rental constitutes the applicant's offer to lease.

Prior decisions of the courts and the Department have consistently held the strict construction applied to oil and gas leasing regulations requires rejection of an application where the first year's advance rental is not timely paid, despite the circumstances surrounding the failure to make timely payment. Dawson v. Andrus, 612 F.2d 1280 (1980), *aff'd* Susan Dawson, 35 IBLA 123 (1978); Kenneth R. Lewis, 70 IBLA 112 (1983); Robert E. Bergman, 53 IBLA 122 (1981). The effect of the regulation is to advance the next qualified drawee to first priority upon the failure of the first drawn applicant to qualify. Dawson v. Andrus, *supra*; Robert D. Nininger, 16 IBLA 200 (1974), *aff'd*, Nininger v. Morton, Civ. No. 74-246 (D.D.C. 1975).

While appellant's arguments concerning reinstatement of an existing lease must be rejected as mere attempts at argument by analogy, there is another reason why the tendered payment should be accepted in this case. The Department has created an exception to the policy which requires strict enforcement of the rule requiring payment of the first year's annual rental for a case such as this, where the applicant dies after becoming the first drawn offeror but before notification was received by him of his success. Generally, the rule in such a case is that the administratrix should be afforded a reasonable time to make the required payment, and a lease should issue. See Estate of Isidor Deemar, 63 IBLA 217, 219-20 (1982).

In Estate of F. J. Bradshaw, 44 IBLA 107 (1979), the identical issue presented by this appeal, payment of the first year's rental, was considered.

In Bradshaw, the applicant received the rental notice and mailed a rental check which was returned by BLM because of a discrepancy between the amounts written in words and numbers appearing on the face of the check. Bradshaw then died on July 23, 1978. The rental payment was received on August 7, 1978, 6 days late. Reversing BLM rejection of Bradshaw's offer, the Board explained:

The occurrence of the death terminated the regulation's timetable for required actions by Bradshaw, and instituted the different regulatory procedure set out in section 3102.8. That section clearly contemplates that any necessary action be taken by an executor or administrator. It would not be unusual that an executor or administrator would not even be deemed qualified before expiration of the 15-day payment period set forth in section 3112.4-1. Section 3112.4-1 must therefore be read as qualified by section 3102.8, which is the specific section providing for the unusual situation before us. The interests of the heirs of the successful offeror are to be protected, and the administrator is intended to have a reasonable time in which to make payment. [Emphasis supplied.]

44 IBLA at 109.

Since the decision in Bradshaw, a revision and recodification of Departmental regulations in 1982 resulted in the elimination of 43 CFR 3102.8 in the form in which it was construed by the Bradshaw decision. The amended, and changed, provision, 43 CFR 3106.1-3, now reads:

If an offeror, applicant, assignee or lessee dies, his/her rights shall be transferred to the heirs, devisees, executor or administrator of the estate, as appropriate, upon the filing of a statement that all parties are qualified to hold a lease in accordance with subpart 3102 of this title[.]

while the former section 3102.8, as construed by Bradshaw, provided: "If an offeror dies before the lease is issued, the lease will be issued to the executor or administrator of the estate if probate of the estate has not been completed * * *."

Despite the change in the regulation, the reasoning behind past precedent of the Department in this area remains compelling. Since the prior Board decisions in Bradshaw and Deemar are not disapproved by the unexplained change in the wording of the regulation, it is concluded that the policy of the Department to protect the interests of heirs in instances where there is a reasonable attempt to make payment should be continued. The question then is whether appellant's efforts in this case were reasonable. While she was

not so prompt as the heirs in the Bradshaw case, appellant has made a timely appeal and has submitted the rental payment for the first year's rent. She has, therefore, achieved minimal compliance with Departmental regulations, and is entitled to claim the benefit of the exception described by the Bradshaw and Deemar opinions. She was appointed administratrix on May 12, 1983. She tendered payment of rental on August 19, 1983. According to the notice of rental due, the first year's rent was to be paid within 30 days of receipt. At the time she received the notice, however, appellant had not been appointed administratrix of the estate. The determination of when the 30-day period should begin to run is therefore difficult, if not impossible, to determine in this case, since either May 3, the date of receipt, or May 12, the date of appointment, could arguably be considered the time from which the 30-day notice period should be calculated. Under the circumstances, it is concluded that appellant tendered payment within a reasonable time, and a lease should issue to her.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is reversed and the case file remanded to BLM for action consistent with this opinion.

Franklin D. Arness
Administrative Judge
Alternate Member

I concur:

James L. Burski
Administrative Judge

ADMINISTRATIVE JUDGE STUEBING DISSENTING:

At the risk of appearing unsympathetic, I would hold that the response of Renate Witmer was delayed for such an unreasonably long time, without any justification being presented, as to warrant our affirmation of the decision to reject the lease application.

On May 3, 1983, Renate Witmer received and signed for BLM's notice to remit the first year's rental and executed forms. She thus had actual notice that BLM expected compliance on or before June 3, 1983. Only nine days later, on May 12, 1983, she was appointed administratrix of the estate of James Witmer by the Superior Court of California, and was thereafter empowered to act for the Estate. At that time she still had 22 days to meet BLM's June 3 deadline. She did nothing. On June 20, 1983, BLM issued its decision formally rejecting the application. This was received on June 27. Still nothing was done toward meeting the requirements. On July 26, a notice of appeal was filed by telegram. Finally, on August 16, 1983, the executed lease offer forms and first year's rental were tendered to BLM. This was 105 days after Renate Witmer had received actual notice of the requirements, and 96 days after her appointment as administratrix.

I agree with the majority that it is proper in cases such as this that the administrator of the estate should be afforded a reasonable time for compliance. In Estate of Bradshaw,⁴⁴ IBLA 107 (1979), the time for compliance was only 15 days (as contrasted with 30 days in this case), and the payment was made only 6 days thereafter (as compared with 75 days past deadline in this case). In Estate of Isidor Deemar, 63 IBLA 217 (1982), it is also apparent that the administrator responded with reasonable promptness.

The extended delay in this case might be regarded as reasonable in other circumstances, as where the notice was received by the decedent and went undiscovered until his affairs were reviewed by those who conducted the estate's business, or where the court had constrained the authority of the administrator. But no such excuse has been provided here. Indeed, no cogent reason whatever has been offered to explain the delay.

"The conduct of government business cannot be compelled to wait the pleasure or convenience of those persons who seek to deal with it." Dawson v. Andrus, 612 F.2d 1280, 1283 (10th Cir. 1980). It appears to me that in this case the Estate took no action until it suited the pleasure or convenience of those who are conducting its affairs.

Edward W. Stuebing
Administrative Judge

